

LIBRARY

SUPREME COURT, U. S. No. 406

Office Supreme Court, U.S.

FILED

SEP 20 1958

JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1958

FEDERAL TRADE COMMISSION, PETITIONER

U.

SIMPLICITY PATTERN CO., INC.

**PETITION FOR A WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

J. LEE BANKIN,

Solicitor General,

VICTOR R. HANSEN,

Assistant Attorney General,

DANIEL M. FRIEDMAN,

Attorney,

Department of Justice, Washington 25, D. C.

EARL W. KINTNER,

General Counsel,

JAMES R. CORKEY,

ALVIN L. BERNAN,

Assistant General Counsel,

Federal Trade Commission, Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	4
Reasons for granting the writ	8
Conclusion	14
Appendix A	15
Appendix B	35

CITATIONS

Cases:

<i>Automatic Canteen Co. v. Federal Trade Commission</i> , 346 U. S. 61	11
<i>Biddle Purchasing Co. v. Federal Trade Commission</i> , 96 F. 2d 687, certiorari denied, 305 U. S. 634	10
<i>Corn Products Refining Co. v. Federal Trade Commis- sion</i> , 144 F. 2d 211, affirmed, 324 U. S. 726	10
<i>Elizabeth Arden, Inc. v. Federal Trade Commission</i> , 156 F. 2d 132, certiorari denied, 331 U. S. 806	10, 12
<i>Great Atlantic & Pacific Tea Co. v. Federal Trade Com- mission</i> , 106 F. 2d 667, certiorari denied, 308 U. S. 625	9, 10, 11
<i>Oliver Bros., Inc. v. Federal Trade Commission</i> , 102 F. 2d 763	10, 12, 13
<i>Southgate Brokerage Co. v. Federal Trade Commission</i> , 150 F. 2d 607, certiorari denied, 326 U. S. 774	10
<i>Webb-Crawford Co. v. Federal Trade Commission</i> , 109 F. 2d 268, certiorari denied, 310 U. S. 638	10

Statutes:

**Clayton Act, 38 Stat. 730, as amended by the Rob-
inson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13:**

	Page
Section 2 (a) -----	2, 4, 7, 8, 9
Section 2 (b) -----	3, 4, 7, 11
Section 2 (c) -----	9
Section 2 (d) -----	9
Section 2 (e) -----	3, 4, 5, 6, 9, 12, 14

Miscellaneous:

80 Cong. Rec. 8225 -----	12
H. Rep. 2287, 74th Cong., 2d sess. -----	13

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. —

FEDERAL TRADE COMMISSION, PETITIONER

v.

SIMPLICITY PATTERN Co., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, prays that a writ of certiorari issued to review the judgment entered in the above case on May 29, 1958, by the United States Court of Appeals for the District of Columbia Circuit, setting aside a Commission order.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A, *infra*, pp. 15-34) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix B, *infra*, p. 35) was entered on May 29, 1958. The time for filing a petition for a writ of certiorari was extended by Mr. Chief Justice Warren on August

28 to September 26, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the defense of "cost justification," which Section 2 (a) of the Robinson-Patman Act expressly provides is a defense to a charge of price discrimination under that section, is also available as a defense to a charge of discrimination in furnishing of services or facilities in violation of Section 2 (e) of that Act.

STATUTE INVOLVED

Section 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13, provides in pertinent part:

(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing

herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

* * * * *

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

* * * * *

STATEMENT

Section 2 (a) of the Robinson-Patman Act prohibits price discriminations, the effect of which "may be substantially to lessen competition or tend to create a monopoly." It further provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered

* * *. Section 2 (e) prohibits any person from discriminating in favor of one purchaser against another purchaser of a commodity bought for resale, by furnishing "any services or facilities" connected with the sale of such commodity "upon terms not accorded to all purchasers on proportionally equal terms." Section 2 (b) provides that, upon proof of any "discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification" shall be upon the respondent and, "unless justification shall be affirmatively shown," the Commission may issue an appropriate order. It further provides, however, that a seller may rebut such a prima facie case by showing "that his lower price or the furnishing of services or facilities to any purchaser * * * was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

Count II of the Federal Trade Commission's complaint in this case (J. A. 2-15¹) charged respondent

¹ "J. A." refers to the joint appendix in the court of appeals.

with violating Section 2 (e) of the Act.² Respondent manufactures and sells dress patterns which are used by women in making their own clothes (J. A. 32-33). It is one of the largest manufacturers and distributors of dress patterns in the United States, and distributes its patterns through retail stores (J. A. 33). Among respondent's larger customers are so-called "five and ten cent" chain stores, and among its smaller customers are so-called "fabric" or "yard goods" shops (*ibid.*). The complaint charged that respondent had furnished its larger customers with services and facilities not accorded to all purchasers on proportionally equal terms, because it had provided the five and ten cent stores with catalogs (which are "necessary to the proper storage and ready access for sale of patterns") and cabinets (which are "essential to a proper display of this promotional material and its ready access to the retail customer") (J. A. 10-11) free of charge, whereas its smaller fabric stores were required, at considerable expense, to buy or rent from respondent the identical or similar facilities (J. A. 10-11).

Respondent's answer, *inter alia*, denied that the five and ten cent stores were in competition with the fabric stores (J. A. 22), or "that the effect of any such practices have the requisite statutory effect on competition provided for in said Act" (J. A. 23); and alleged that "the value of any service or facility furnished to any one customer or group of customers and not

² Count I, which charged respondent with violating Section 5 of the Federal Trade Commission Act, was dismissed by the Commission for failure of proof (J. A. 34-36).

furnished to other customers" merely reflected "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which its products are sold to its customers" (J. A. 22).

After full administrative proceedings, the Commission held that respondent had violated Section 2 (e) as charged, and entered a cease-and-desist order (J. A. 23-37). The Commission ruled that the five and ten cent stores and the smaller independent stores "are in competition in the sale of respondent's patterns" (J. A. 36); that it is unnecessary to show, as part of a prima facie case under Section 2 (e) of the Act, that the discriminations may injure competition (J. A. 27-28); and "that 2 (e) should [not] be read * * * so as to permit the introduction of evidence relating to cost justification which is provided for in 2 (a)" (J. A. 36).

By a divided court, the Court of Appeals for the District of Columbia Circuit reversed the Commission's order and remanded the case to the Commission for further proceedings. A majority of the court (Judges Danaher and Washington) agreed with the Commission that no proof "of competitive injury * * * was required to establish a prima facie case" and that "Injury to competition is not suggested as an element of a § 2 (e) violation" (*infra*, p. 22).³ A different majority (Judges Danaher and Burger),

³ Judge Burger, however, noted "his conviction that Congress intended not to create an un rebuttable presumption but sought actually to prohibit only such discrimination as produced a competitive injury * * *" (*infra*, p. 28, note 13).

however, held that the Commission had erred in refusing to receive evidence relating to respondent's cost justification defense.

Writing for this majority, Judge Danaher first rejected respondent's contention that the "justification" which Section 2 (b) permits to be "affirmatively shown" to a charge of discrimination "reaches so far as to import § 2 (a) criteria as matters of defense to a Section 2 (e) charge" (*infra*, p. 27). He pointed out (*ibid.*) that Section 2 (a) "makes no reference whatever to 'services or facilities furnished.'" The court further held, however, that "'cost justification' [in terms of respondent's "costs of sale and delivery as related to the differing methods of sale and distribution by the two groups that the facilities were so provided"] under the circumstances here may affirmatively be shown in order to dispel the charge of unlawful discrimination" (*infra*, pp. 27-28). The court stated (*infra*, p. 28) that Congress "must have intended that the justification to be shown under the first clause of § 2 (b) as to a § 2 (e) charge of discrimination in 'facilities furnished' to various customers, was to depend upon the facts in a particular case," and that since the Act "proscribes only such discrimination as is inimical to the public interest," respondent is entitled under the justification clause of Section 2 (b) to go forward with proof of "a cost justification * * * which dispels the complaint of such discrimination" (*infra*, p. 31). It stated (*infra*, p. 32) that, on the remanded proceedings, respondent "may offer such evidence [of cost justification] as may establish the fact that *unlawful* discrimination in favor of one

group as against another group of customers was not worked in any of the ways comprehended within § 2 (e)."

Judge Washington, dissenting, was of the view that the cost justification defense is "available in a case brought under Section 2 (a), but not in one brought under Section 2 (e)" (*infra*, p. 34). He stated (*infra*, p. 33, footnotes omitted) that it "is firmly grounded in the decisions" that "[t]he 'justification' referred to in Section 2 (b) must be that described in the meeting-competition proviso to that section, or such justification as may be spelled out from the provisions of the particular section—other than Section 2 (b)—creating the offense alleged." He urged (*id.*, pp. 33-34) that, since the 2 (b) proviso was here inapplicable, the only justification permitted under Section 2 (e) is "a showing by the seller that * * * the facilities furnished were accorded to all purchasers on proportionally equal terms."

REASONS FOR GRANTING THE WRIT

In holding that cost justification may be shown as a defense to a charge of discrimination in furnishing services or facilities under Section 2 (e) of the Robinson-Patman Act, the court below has decided an important question of federal law, not yet settled by this Court, contrary to the principles which other courts of appeals have applied in construing that section and the related provisions of Sections 2 (c) and 2 (d) of the Act.

The only section in the Act expressly providing for a defense of cost justification is Section 2 (a) (deal-

ing with discrimination in price). Prior to the decision below, it was well settled that this and other provisions of Section 2 (a) were not to be read into either Section 2 (e), or the related provisions of Section 2 (c) (dealing with brokerage payments) or Section 2 (d) (dealing with payment of allowances).^{*} In short, all four subsections—(a), (c), (d), and (e)—were construed to be independent of each other in this respect.

Thus, in *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667 (C. A. 3), certiorari denied, 308 U. S. 625, the court held that the Commission properly had refused to permit a cost-justification defense to be introduced in a 2 (c) case involving the receipt of illegal brokerage. The court stated (p. 677) that, while Section 2 (a) "deals with discriminations in price generally," 2 (c) "deals in particular with a trade practice which has frequently resulted in price discriminations and unfair competition," and that "[t]o read the words of paragraph (a) into paragraph (c) destroys the Congressional intent." Similarly, although Section 2 (a) prohibits only those discriminations in price which may result in injury in competition, such competitive injury need

^{*} Section 2 (c) prohibits the payment or receipt of any brokerage, or allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise. Section 2 (d) prohibits payments to a customer for services or facilities furnished by or through such customer in connection with the distribution of any products or commodities, unless such payments are available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

not be shown to establish an illegal discrimination in services and facilities in violation of Section 2 (e) (*Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (C. A. 2), certiorari denied, 331 U. S. 806; *Corn Products Refining Co. v. Federal Trade Commission*, 144 F. 2d 211, 219 (C. A. 7), affirmed, 324 U. S. 726), or illegal commissions or brokerage fees in violation of Section 2 (c) (*Biddle Purchasing Co. v. Federal Trade Commission*, 96 F. 2d 687, 690 (C. A. 2), certiorari denied, 305 U. S. 634; *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 766, 767 (C. A. 4); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 676-677 (C. A. 3), certiorari denied, 308 U. S. 625; *Webb-Crawford Co. v. Federal Trade Commission*, 109 F. 2d 268, 269 (C. A. 5), certiorari denied, 310 U. S. 638; cf. *Southgate Brokerage Co. v. Federal Trade Commission*, 150 F. 2d 607, 609-610 (C. A. 4), certiorari denied, 326 U. S. 774). Indeed, the court below recognized the controlling force of these decisions, for it sustained the Commission's ruling that competitive injury was not an element of a Section 2 (e) violation.

In the *Oliver Bros.* case, *supra*, Chief Judge Parker pointed out (p. 767, emphasis added) that the "three specific matters" condemned as unfair trade practices by subsections (c), (d), and (e)

were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read into the sections forbidding them the limitations contained in section 2 (a) having relation to price discrimination, which is an extremely difficult matter

to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and *no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.* [Emphasis added.]

This statement was quoted with approval by Chief Judge Biggs in the *Great Atlantic & Pacific Tea Co.* case, *supra*.

Similar reasoning, we believe, supports the conclusion that the cost justification defense of Section 2 (a) is not to be read into Section 2 (e). The provision in Section 2 (b) which permits a respondent, upon proof of a discrimination in prices, services or facilities, to show "justification," does not create any new substantive defense, but merely "attempts to lay down the rules of evidence under the Act" (*Automatic Canteen Co. v. Federal Trade Commission*, 346 U. S. 61, 75). Since the only "justification" which Section 2 (b) itself provides is a showing that a discrimination in prices or in services or facilities "was made in good faith to meet an equally low price of * * * or the services or facilities furnished by a competitor," any other "justification" must, as Judge Washington stated in his dissenting opinion, "be spelled out from the provisions of the particular sections—other than Section 2 (b)—creating the offense alleged."*

* As originally drafted, Section 2 (b) applied solely to "discrimination in price." The references to "services or facilities"

There is nothing in Section 2 (e), flatly prohibiting discrimination in favor of particular customers by giving them services or facilities not available to all purchasers on proportionately equal terms, which even suggests that such discrimination may be cost justified. On the contrary, since the cost justification provision appears only in the section dealing with price discrimination, whereas the meeting competition defense is expressly applicable both to discrimination in price and discrimination in services and facilities, the plain inference is that cost justification is *not* a defense in cases involving discrimination in services and facilities. As Judge Frank stated in the *Elizabeth Arden* case, *supra*, "We see no reason why the limitations contained in (a), or their equivalent, should be read into (e)." 156 F. 2d at 135. See also *Oliver Bros.* case, *supra*.

This view also is supported by the legislative history of Section 2 (e). It shows that Congress sought to eliminate the evil of sellers granting "special allowances" to "large buyer customers" by "prohibiting

were inserted on the floor of the House after the following explanation was made on behalf of the House Judiciary Committee by Congressman McLaughlin (80 Cong. Rec. 8225 (1936)):

Mr. Chairman, this is a committee amendment agreed to unanimously by the committee, and was explained yesterday. It simply allows a seller to meet not only competition in price of other competitors but also competition in services and facilities furnished.

The legislative history gives no indication that Section 2 (b) was designed to permit a seller charged with violating 2 (e) to show cost justification.

the granting of such allowances, either in the form of services or facilities themselves furnished by the seller to the buyer, or in the form of payment for such services or facilities when undertaken by the buyer, except when accorded or made available to all competing customers on proportionally equal terms." H. Rep. 2287, 74th Cong., 2d sess., pp. 15-16. To permit an additional exception for such allowances which are cost justified would substantially weaken the protection which Congress endeavored to provide for small buyers against "oppressive discriminations" (*ibid.*). To permit the additional exception, moreover, would greatly lengthen the administrative proceedings in Section 2 (e) cases.

Nor can it be said to be anomalous to permit cost justification as a defense in a price discrimination case, but not in one involving discriminations in services and facilities. As Chief Judge Parker noted in the *Oliver* case, *supra*, "The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice." Moreover, Congress reasonably could have concluded that the character of discriminations in services and facilities may make it so difficult to determine whether they are cost justified* that they should be prohibited completely unless the services and facilities are made available to all purchasers on proportionally equal terms.

* Such determinations may involve such difficult questions as the cost of rendering such services, their value to the recipient, and their value (on a "proportional" basis) to the customers being discriminated against.

The basic holding of the court below—that cost justification is a defense in 2 (e) proceedings—is a significant one in the administration of the Robinson-Patman Act. Particularly is this so in view of the court's suggestion that the Commission in such cases is required to determine whether, "upon the facts in a particular case," the discrimination there shown is "inimical to the public interest" (*infra*, pp. 28, 31). But Section 2 (e) does not provide for such a general public interest evaluation in each case; subject only to the 2 (b) "meeting competition" proviso, Section 2 (e) flatly prohibits all discriminations resulting from failure to furnish services and facilities to all customers "on proportionally equal terms." If any additional exceptions are to be established, it should be done by Congress, and not by the courts.

CONCLUSION

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,

Solicitor General.

VICTOR R. HANSEN,

Assistant Attorney General.

DANIEL M. FRIEDMAN,

Attorney.

EARL W. KINTNER,

General Counsel,

JAMES E. CORKEY,

ALVIN L. BERMAN,

Assistant General Counsel,

Federal Trade Commission.

SEPTEMBER 1958.

APPENDIX A

In the United States Court of Appeals for the
District of Columbia Circuit

No. 13884

SIMPLICITY PATTERN CO., INC., A CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF ORDER OF THE
FEDERAL TRADE COMMISSION

Decided May 29, 1958

Mr. William Simon for petitioner. *Mr. Harold F. Baker* also entered an appearance for petitioner.

Mr. Alvin L. Berman, Attorney, Federal Trade Commission, with whom *Mr. James E. Corkey*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent.

Before WASHINGTON, DANAHER and BURGER, *Circuit Judges*

DANAHER, *Circuit Judge*: Simplicity Pattern Co., Inc., petitioner herein, is engaged in the manufacture and sale of patterns widely purchased by women customers intent upon making their own garments. The case does not involve Simplicity's competitors in the pattern field, but discrimination favoring one group of customers by the furnishing of facilities not made available to other customers on proportionally equal terms. Simplicity asks us to review and set aside the

Commission's order of March 13, 1957, that petitioner cease and desist from:

"Contracting to furnish or furnishing to any of respondent's customers counter catalogs, cabinets or other equipment or facilities connected with the handling, sale or offering for sale of respondent's patterns, unless such catalogs, cabinets or other equipment or facilities are available on proportionally equal terms to all customers competing with such favored customers in the sale of respondent's patterns."

The Commission's complaint had contained two counts, Count I brought under §5 of the Federal Trade Commission Act¹ charging that petitioner had extended to larger customers, certain chain stores (hereinafter sometimes referred to as "Red Fronts"), a "standing debit" under which such customers did not pay for their initial inventory of stock, a short term contract, and prepaid transportation. Such bases for doing business had not been extended to smaller customers, particularly certain retailers (hereinafter sometimes referred to as "fabric stores"). Concluding that the record lacked substantial evidence to warrant a finding of injury to competition, the examiner dismissed Count I. Counsel supporting the complaint appealed, but the Commission affirmed, concluding that adverse competitive effect upon Simplicity's competitors or among its customers had not been established. Count I, thus, is not before us.

Count II alleged violation of subsection 2 (e) of the Clayton Act, as amended,² in that the petitioner had

¹ 52 Stat. 111 (1938), 15 U. S. C. § 45 (1952).

² 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U. S. C. § 13 (e) (1952). The subsection in pertinent part here said to be applicable reads: "It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a

supplied to its larger customers, the Red Fronts, free monthly counter catalogues and certain storage cabinets, while the small customers such as the fabric shops had been required to pay for the same or similar items. The examiner concluded that the practices denounced in Count II violate § 2 (e). Simplicity appealed, but the Commission affirmed, adopting the findings, conclusions and the order contained in the initial decision.

The Commission's opinion recited Simplicity's contention that there is no meaningful competition between the larger stores, the "Red Fronts," and the smaller independents, the "fabric shops," since the Red Fronts sell patterns for a profit while the fabric shops do not intend to make a profit. Rather they sell Simplicity's patterns as a necessary incident to their sale of fabrics. The opinion then runs on:

"* * * Considering the circumstances appearing in the record, this argument is not wholly without merit, but we agree with the examiner's conclusion that the two kinds of stores are in competition in the sale of respondent's patterns. An element of rivalry exists in spite of the fact that the fabric shops sell the product primarily as an accommodation. It appears that they may not profit dollarwise in the sale of patterns alone, but they recognize the value of such business for attracting customers who may purchase other goods. The two kinds of stores are vying for the same particular markets whatever their motives may be. In our opinion this sufficiently discloses the presence of competition between them.

commodity bought for resale * * * by * * * furnishing * * * any services or facilities connected with the * * * sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

"[Simplicity] asserts, in addition, that the cabinets have no real relationship, as the statute provides, to the 'handling, sale, or offering for sale of such' patterns, and that dress patterns are not a commodity within the meaning of Section 2 (e). There appears to be no merit in either of these contentions or various other arguments made by [Simplicity], and each is rejected."

The Commission confirmed the examiner's conclusions. His findings, so far as pertinent to our review, we now paraphrase.

Simplicity, a New York corporation, is one of the largest manufacturers and distributors of dress patterns, with sales extending throughout the United States. Its patterns are sold to all customers, Red Fronts and fabric stores alike, at 60% of the labeled retail prices of 25¢, 35¢ and 50¢, and both groups of stores retail at those labeled prices.

Simplicity supplied to the Red Fronts, *free of charge*, monthly counter catalogues which depict Simplicity's patterns and are essential to the retail sale of patterns. Fabric stores were required to pay for such catalogues a price of \$1.65 to \$2 each, depending upon the binding.

Simplicity furnished to the Red Fronts, *free of charge*, cabinets and other equipment while fabric stores were required to purchase or rent such equipment.

Red Fronts merchandised the patterns as they do any other item, and unless the patterns can show a profit, the Red Fronts will not handle them. A prospective retail purchaser may examine a catalogue in a small space on the counter beneath which, in a cabinet, the patterns are stored. On the other hand, the fabric stores usually made no profit on the sale of patterns and did not expect to do so. The fabric

stores handled the patterns to promote the sale of fabrics and because the customers expected this service. "The patterns, catalog, fashion previews and other advertising material are prominently displayed and the customer is invited to sit and browse through the material, all in order to promote fabric sales," the examiner found.

He concluded, despite the differences in sales methods, that the two groups of stores compete in the sale of patterns. "It is difficult to say that two stores in the same shopping area, possibly side by side, are not in competition when^o they are selling the same article at the same price to essentially the same segment of the public * * *."

"* * * The catalogs supplied the two groups of stores are identical. While the cabinets differ materially in design and appearance, the fact remains that they serve essentially the same purpose—as a storage place for the patterns pending their sale to the public.

"True, there is no showing of competitive injury. But this, as the examiner understands, is not required in a proceeding under Section 2 (e). Given the element of jurisdiction, it appears that a prima facie case is established when it is shown that a seller is supplying to one customer facilities for use in the resale of the seller's products, and not supplying such facilities to the competitor of the favored customer on proportionally equal terms. In short, Section 2 (e) appears to be a per se statute, requiring no proof of competitive injury." (Emphasis supplied.)

* As to Count I, the examiner had noted, "The record seems clearly to be without any substantial evidence warranting a finding of injury to competition," as between the Red Fronts and the fabric stores. The Government had already conceded before the examiner that no competitive injury had been

Part I

We agree that, for the purpose of establishing a prima facie case, there was discrimination favoring the Red Fronts, since there is substantial support in the record as a whole that Simplicity furnished to their catalogues and cabinets free of charge while the fabric shops were required to buy or rent the identical or similar facilities.

"Petitioners thus furnished a service connected with the sale or offering for sale of a commodity upon terms not accorded to other purchasers. * * * *It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.*"⁴ (Emphasis supplied.)

We agree that the Red Fronts and the fabric stores, operating in the same cities and in the same shopping area, often side by side, were competitors, purchasing from Simplicity at the same price and then at like prices retailing the identical product to substantially the same segment of the public.⁵ Simplicity would have us say, despite such facts, there was no

shown as to pattern makers and manufacturers competing with Simplicity. As to Count II, we will demonstrate first our agreement that a prima facie case was made out. But the Examiner's understanding of the effect of such proof failed to give effect to Section 2 (b), the first clause of which, applicable here, expressly permits proof of "justification," *infra*, Part II.

⁴ Corn Products Co. v. Comm'n, 324 U. S. 726, 744 (1945).

⁵ Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132 (2 Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d 988 (8 Cir. 1945), *cert. denied*, 326 U. S. 773 (1945).

competition here. It points to the Commission's observation, *supra*, that its argument "was not wholly without merit." Simplicity contends the Red Fronts must sell patterns at a profit while the fabric stores seek none from their sale of patterns. Their profit comes from the sale of fabrics, and they merchandise the patterns simply as a matter of service and for customer convenience. We have no doubt a pattern purchaser in a Red Front may there purchase needles, thread, thimbles, shears, tape measures and what not, each item yielding its mark-up to supplement the profit derived from the pattern sale. But both groups of stores were selling patterns. Simplicity chose to pioneer sales through Red Fronts. It decided it was good business to provide, free of charge, catalogues and cabinets which facilitate pattern sales in Red Front pattern stores. Fabric stores, however, not only are not shown to have been accorded like facilities on proportionately equal terms but to be required to bear a very considerable expense, either to buy or rent comparable facilities. We may assume that had the facilities been available to the fabric stores on "proportionally" equal terms, there could be no discrimination within the meaning of the section. Section 2 (e), as invoked here, subject to § 2 (b) to which we will soon refer, simply proscribes as unlawful the discrimination here complained of. It says nothing about the methods to be employed in the resale of the commodity. It is silent as to the motives which actuate the "purchaser" in his handling of the product involved. But both groups sold the same article to the same type of buyer in the same shopping area. We have no doubt they are thus competitors, but whether or no, as "purchasers" from Simplicity, they come within § 2 (e) in the context here applied.

We agree that there was no showing of competitive injury, and that no such proof was required^{*} to establish a prima facie case. Injury to competition is not suggested as an element of a § 2 (e) violation. Even though absence of competitive injury was here found, that fact is immaterial to the point we here discuss. Section 2 (e) was written for the promotion of fair dealing among the customers of a seller. It was intended to protect purchasers against such discrimination as might arise from unequal and *unjustified* furnishing of services or facilities to be employed in marketing the seller's goods. It would seem obvious, we might say in passing, regardless of a lack of competitive injury, Red Fronts for each \$1,000 of sales received a mark-up of \$400, while fabric stores received per \$1,000 of sales, \$400 less the cost of cabinets and catalogues. Competitive *opportunities* might at least seem disparate.⁷

Thus, without more, on the facts so far treated, a "prima facie case" within the meaning of § 2 (b) may be made out which comes squarely within the interdiction of § 2 (e). But Congress has said, in effect, having in mind the purposes of the Robinson-Patman Act, there may be discrimination such as has been discussed—*unless justification can be shown*. Congress has not enacted § 2 (e) in isolation—the interdiction does not stand alone. Accordingly, while

^{*} "The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others * * *." *Corn Products Co. v. Comm'n*, *supra* note 4; *Corn Products Refining Co. v. Federal Trade Comm'n*, 144 F. 2d 211, 219 (7 Cir. 1944); *Elizabeth Arden, Inc. v. Federal Trade Commission*, *supra* note 5, 156 F. 2d at 135.

⁷ Cf. *Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37, 46 (1948), a § 2 (a) case to be sure, which nevertheless reflects the spirit of the legislation.

a prima facie § 2 (e) case may be developed even without a showing of competitive injury, Congress clearly contemplated situations might arise for which justification may exist. It specifically provided for such an exigency in § 2 (b) which, in pertinent part, reads:

“(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in * * * facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing [herein] contained * * * shall prevent a seller rebutting the prima facie case thus made by showing that his * * * furnishing of * * * facilities to any purchaser or purchasers was made in good faith to meet * * * the * * * facilities furnished by a competitor.”

We see from the first clause that when a prima facie case has been made of discrimination attributable to the *furnishing of facilities*, an order terminating the discrimination may be issued “unless justification shall be affirmatively shown” by the seller. Whether *customers* or *competitors* are involved as to the first portion of § 2 (b) clearly that justification must be a *legal* justification, one which dispels that unlawfulness which the purpose of the Act and the public interest require to be suppressed. Then, it is further spelled out in the proviso that if a *competitor* shall *lawfully* furnish facilities, a seller may rebut a charge of discrimination by showing he has furnished facilities in a good faith effort to provide like facilities. This must be so, for neither the Commission nor the courts could countenance the unlawful furnishing of

facilities by one charged under § 2 (e) in order to meet like *unlawful conduct* of a competitor.⁹ Section 2 (b), then, provides for rebuttal of a *prima facie* case of discrimination when charged to have been practiced among a seller's *customers*, as in a § 2 (e) case, and in special circumstances as noted, where the seller's *competitors* are involved. While a complete § 2 (e) case may be made out which, without more and unrebutted, constitutes a "per se" case, as the examiner put it, the alleged violator under § 2 (b) may go forward and establish "justification." If he affirmatively sustains his burden, there no longer is unlawful discrimination.

Part II

Here Simplicity sought and procured a ruling that no evidence of "cost justification" could have any effect on the examiner. The latter had already concluded, in effect, that the per se violation, established as he found, was impervious to any such defense. He thus reflected the position of the Commission as put in its brief, that "Congress has already determined that the practice covered by Section 2 (e) has the tendency and capacity to injure competition, and injury to competition is not a matter to be litigated in any particular case, either as a part of the case in chief, or as a matter of rebuttal."¹⁰ In effect we are told if "discrimination" arises under § 2 (e), a finding of violation automatically must follow. We are at a

⁹ Cf. *Elizabeth Arden Sales Corporation v. Gus Blass Co.*, *supra* note 5, 150 F.2d at 995, 996. The proviso portion of § 2 (b) is not here involved, it may be observed in passing.

¹⁰ The Commission relies upon § 2 (c) cases which have no bearing whatever upon our problem. Sec. 2 (b) specifically provides for rebuttal by way of justification where the alleged discrimination among *customers* arises from the furnishing of facilities. No such provision is related to § 2 (c) violations. Cf. *Oliver Bros. v. Federal Trade Commission*, 102 F.2d 763 (4 Cir. 1939); *Webb-Crawford Co. v. Federal Trade*

loss to reconcile this claim with the provisions of § 2 (b) expressly outlining the procedures which permit rebuttal by way of "justification" and establish the burden of proof. Indeed, the Commission actually argues to us in its brief that the rebuttal proviso of § 2 (b) authorizing a good faith meeting of facilities furnished by a competitor is "obviously" the "matter of rebuttal which is referred to in the first portion of Section 2 (b)." The Commission would have us eliminate the first clause, and, in effect, would thus read § 2 (b) out of the case. We find this position to be completely erroneous for the reasons we have suggested. The error undoubtedly underlay the examiner's conclusion as to the preclusive status he ascribed to the "per se" case which in truth was no more than the prima facie case under § 2 (e) to which the pertinent portions of § 2 (b), as a whole, were expressly related.

The Commission has asked that we not consider this clear error on the ground that the point had not been saved of record. Had Simplicity not raised the "cost justification" issue, we agree we would be so precluded and we have repeatedly so held.¹⁰

From the very outset, and persistently asserted throughout the proceedings, was Simplicity's claim that "cost justification" was available as a defense. The point was not only briefed and argued by both sides, but was passed upon by the Commission. Peti-

Commission, 109 F. 2d 268 (5 Cir. 1940), *cert. denied*, 310 U. S. 638 (1940).

¹⁰ See, e. g., *Barclay Home Products, Inc. v. Federal Trade Commission*, 100 U. S. App. D. C. 46, 241 F. 2d 451 (D. C. Cir. 1957), *cert. denied*, 354 U. S. 942 (1957); *Albertson v. Federal Communications Commission*, 100 U. S. App. D. C. 103, 106, 243 F. 2d 209, 212 (D. C. Cir. 1957), and cases cited in both.

tioner's answer to the original complaint, in pertinent part read:

"* * * Respondent denies that the value of any service or facility furnished to any one customer or group of customers and not furnished to other customers exceeds the difference in the costs of manufacture, sale, or delivery resulting from the differing methods or quantities in which such products are sold, distributed, or delivered to such respective customers."

Following oral argument on Simplicity's motion to dismiss which the examiner granted as to Count I and denied as to Count II, he set a conference for the simplification of issues. The transcript of proceedings then held, made part of the record, showed an announcement by the examiner that "my views are definite and my thought at the present time is that cost justification in a case of this kind is not available as a defense." An excerpted colloquy is revealing.¹¹ We are satisfied that the point is properly before us.¹²

¹¹ "Mr. SIMON. Judge, do I understand that if evidence were offered and Mr. Smith would not object and it would be received in evidence on cost justification, that you would still not hold it was a defense to an answer under 2 (e)?"

"Hearing Examiner PACK. Yes, sir. That is correct. I don't understand that the failure to object would affect the law in any way and if the evidence should be received, and if I should continue to entertain the views which I now hold, it seems to me the evidence would simply have to be disregarded in the decision of the case. I do not understand that reception of the evidence into the record, even without objection, would make any difference insofar as the law is concerned."

"Mr. SIMON. For the purpose of this record, Judge, may the record show that you would hold that it was not a defense to an action under 2 (e)?"

"Hearing Examiner PACK. Yes, sir."

¹² Of course a proffer ordinarily is contemplated by the Commission's rules, 16 C. F. R. 3.15 (c) (3) (Supp. 1956). Here,

The Act has not defined "justification," as used in § 2 (b), where, as we have observed, the first clause permits justification to be "affirmatively shown" when the discrimination charged involves, as here, the furnishing of facilities to *customers*. We do not agree with petitioner that such justification reaches so far as to import § 2 (a) criteria as matters of defense to a Section 2 (e) charge. Section 2 (a) makes no reference whatever to "services or facilities furnished."

Conversely, it seems equally clear that the "proportionally equal terms" reference in § 2 (e) is not a complete answer, for there *could* be no discrimination, having in mind the purposes of the Act, if all buyers of goods for resale may obtain services or facilities connected therewith on "proportionally equal terms." We understand Simplicity to be entitled to undertake to prove in terms of its costs of sale and delivery as related to the differing methods of sale and distri-

where the examiner and the Commission itself had equated the establishment of a *prima facie* case with a conclusive determination of violation, it would seem to have been futile to have taken the time and to have incurred the expense of establishing cost justification where the point was deemed foreclosed. In any event, briefed and argued as it was, the point was fully before the Commission and the purpose of the rule was met. If it could be said under the circumstances that there was a failure of compliance with the rule, the Commission seems to have waived it. Its opinion recites:

"Respondent argues principally that 2 (e) should be read in conjunction with other subsections of Section 2 so as to permit the introduction of evidence relating to cost justification which is provided for in 2 (a). We cannot concur in this argument. 'Congress validly made the decision that conduct coming within the more definite standard of (e) was unlawful. We see no reason why the limitations contained in (a), or their equivalent, should be read into (e).' *Elizabeth Arden, Inc., et al. v. Federal Trade Commission*, 156 F. 2d 132."

bution by the two groups that the facilities were so provided, with § 2 (e) in mind, that "cost justification" under the circumstances here may affirmatively be shown in order to dispel the charge of unlawful discrimination. In short, we look to § 2 (b) as affording two separate and distinct grounds upon which "justification" may rest, one, such as was considered in *Elizabeth Arden v. F. T. C.*, *supra* note 5, arising under the § 2 (b) proviso, and another such as may be developed here under the first clause of § 2 (b). In the § 2 (b) proviso situation presented in the *Elizabeth Arden* case, the court's recital noted at page 133 that the seller was out "to beat and not to meet" its competitors. Here no competitors are involved, but only a claim of discrimination as between the two classes of customers. Congress certainly never wrote § 2 (b) with its varying facets only to have the entire section conditioned to situations arising under the proviso. Congress, we think, must have intended that the justification to be shown under the first clause of § 2 (b) as to a § 2 (e) charge of discrimination in "facilities furnished" to various customers, was to depend upon the facts in a particular case. That the term may include a "cost justification" which Simplicity desired to establish seems clear enough.¹³

¹³ Judge Burger has authorized me to note his conviction that Congress intended not to create an un rebuttable presumption but sought actually to prohibit only such discrimination as produced a competitive injury, and certainly never intended to bar discrimination which might have a beneficial effect as promoting sales by and among competitors. He points to two sources to demonstrate the basis for his more comprehensive view, viz: (a) American Law Institute, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT (1953) at 114-115: "There seems to be little logic in making disproportionate but bona fide allowances or services to competing purchasers (which may not amount to a discrimination

Here the catalogues were apparently identical. The cabinets, while designed to contain patterns for ready reference, were markedly different. The Red Fronts sold patterns at a counter space, some 14 by 14 inches, just large enough to place a catalogue on the counter. The patterns were stored in cabinets or boxes under the counter. But the fabric stores desired "rather expensive, well appearing, nice looking articles of furniture [which] compare probably to a fairly expensive filing cabinet in the office of a lawyer or businessman," the examiner noted. These, we take it, coincide with the fabric stores' management's desire to exploit their sale of fabrics. Their purchase of good-looking furniture, a cabinet costing \$150, "made to appear attractive," might well be related to the creation of a business environment conducive to ultimate sales of the goods on which their profit depended.¹⁴ Simplicity had some 6,000 customers who

in price) create, in effect, a conclusive presumption of injurious effect upon competition, whereas the charge of different prices to competing purchasers is only prima facie evidence of such injury"; (b) REPORT OF THE ATTORNEY GENERAL'S NAT'L COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) at 191-2: "[T]he Committee disapproves the present disparity in the statutory consequences which attach to economically equivalent business practices. * * * Antitrust enforcement should not be complicated by diverse legal consequences solely dependent on whether a discriminatory concession masquerades as * * * 'allowance', or 'service' rather than a naked quotation in price. For, as the Supreme Court has recognized, in any reasonable implementation of antitrust objectives 'the crucial fact is the impact of the particular practice on competition, not the label it carries.'" (Emphasis added.) Cf. *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F. 2d 1 (7th Cir. 1949), cert. denied, 338 U. S. 948 (1950).

¹⁴ Simplicity's brief before the Commission noted: "Display is an element in this effort and, generally, three or more superior

purchased patterns in an amount less than \$400 per year and who were serviced at a loss. Overall, 82% of Simplicity's 12,300 customers, as fabric stores, accounted for only 30% of its total dollar volume of sales, while Red Fronts operated some 3,200 separate outlets. One of the six witnesses had pattern sales of \$178 per year. The cost of catalogues and cabinets may have seemed of scant moment to fabric store operators who obtained their real profit from fabric sales. As the examiner said: "They emphasize that they handle patterns only to sell fabrics and because their customers expect the service. None of these witnesses regards the competition of the 10¢ stores in the sale of patterns as of any real consequence."

It seems clear that the examiner felt bound by his understanding that § 2 (e) constituted a per se statute where violation automatically followed from proof that the furnishing of facilities to one group was discriminatory if another group, to serve its own ends, bought and paid for catalogues and cabinets. No evidence of "cost justification" for the different treatment, he said, could rebut his conclusion which the Commission seems to have shared. We are satisfied

quality pattern cabinets were prominently displayed. Usually these were 4-drawer, all steel, cabinets with roller bearing drawers—somewhat like modern office filing cabinets—with simulated mahogany and light colored wood finishes." The record does not show whether or not these cabinets, apparently adapted to the orderly filing of various types of patterns, frequently changing, were purchased to satisfy the particular decor of the fabric store customer, nor whether or not Simplicity sold them at cost as a matter of service to fabric store customers. Simplicity insisted that it could not be expected "to furnish free cabinets, costing several hundred dollars, to a prospective smaller customer on whose business it could not expect to earn that profit during many years." It argued that such differences in treatment as might exist "could well have been cost justified had the Examiner permitted Simplicity to do so."

that the Act proscribes only such discrimination as is inimical to the public interest. If a cost justification can be shown which dispels the complaint of such discrimination, Simplicity is entitled under the first clause of § 2 (b) to go forward with such proof.

Of course the burden of proof of justification rests upon Simplicity,¹⁵ but § 2 (b), "infelicitous language"¹⁶ or not, certainly applies to a § 2 (e), proceeding. Congress recognized that not *every* case of seeming discrimination is barred, just as § 2 (f) "does not reach all cases of buyer receipt of a prohibited discrimination in prices."¹⁷ In the *Automatic Canteen* case, the Court rejected the Commission's claims as to the effect of § 2 (b), and observed that considerations of fairness and convenience must be regarded as controlling.¹⁸ Perhaps it is not without significance that the Commission had not here sought to make a § 2 (f) case against the Red Fronts. Here, it will be remembered, the wholesale prices of the patterns to the two groups were identical, just as were the retail prices to the public. We are bound to conclude, as we see this record, that the seller's costs may have an important bearing on the business practices alleged to have been discriminatory.

Here the Commission as a practical fact would have us bar all evidence of cost justification, whatever it may be. We think the Court in its reading of the

¹⁵ *Automatic Canteen Co. v. F. T. C.*, 346 U. S. 61, 77 (1953); *Trade Comm'n v. Morton Salt Co.*, 334 U. S. 37 (1948).

¹⁶ Cf. *Automatic Canteen Co. v. F. T. C.*, *supra* note 15, 346 U. S. at 78. The Court of Appeals had read the "apparently careful choice of language" as not "meaningless." See, *idem*, 194 F. 2d 433, 438 (7 Cir. 1952).

¹⁷ *Id.* at 71.

¹⁸ 346 U. S. at 78; and see the Court's note 17, *Id.*, at 75, "a reference to § 2 (b) is to the procedural language preceding the proviso," and discussion at 76 and 77.

Act has pointed the way.¹⁹ We conclude that Simplicity should be entitled, affirmatively within the meaning of § 2 (b), to demonstrate "cost justification." To that end it may offer such evidence as may establish the fact that *unlawful* discrimination in favor of one group as against another group of customers was not worked in any of the ways comprehended within § 2 (e).²⁰ We assume the Commission in its consideration of the problem will regard the pur-

¹⁹ Essential fairness is the keynote, 346 U. S. at 78-81.

²⁰ Oral argument yielded no adequately explanatory answer to our question based upon a not entirely hypothetical case: can it be said as a matter of law that § 2 (e) reaches as discriminatory, the rental or sale of vending machines to an industrial group which pays an appropriate charge therefor, while a drug store chain would refuse the machines even if furnished gratis? We took as illustrative an interstate purveyor of foodstuffs, coffee and soft drinks which are sold, wholesale, at identical prices per item, to industrial establishments, gasoline stations, on the one hand, and to a chain of drug stores on the other. The latter desires no vending machine clientele, it wants counter customers who while in the "drug" store, also may buy other goods, cameras, summer chairs, cutlery and what not. The profits from such sales make up for "loss leader" counter business, and the drug chain is free from the necessity of maintaining kitchens to prepare and trucks to distribute the foods and beverages. The industrial group wants to serve its patrons and to keep its employees on the job not leaving the premises for a coffee break. The purveyor could not have met the costs of providing vending machines for the gas stations except for its large volume sales to the drug chain. The charges to the consuming public are the same in each case.

The purveyor is interested in selling its foodstuffs and beverages. Its costs in making available the vending machines, with whatever capital is locked up in the venture, are an expense involved in its doing business, in meeting the particular and peculiar demands of two types of customers for its goods, one group which desires a facility of a particular type, and another which will not have the facility under any circumstances. Both classes of customers, at prices both are willing

poses of the Act and the public interest criteria which should guide its thinking. To that end we set aside the Commission's order and remand this case.

WASHINGTON, *Circuit Judge, dissenting*: The disposition of this case turns on the meaning to be given to Section 2 (b) of the Clayton Act, as amended. That section permits one against whom a *prima facie* case is made to show "justification" for his conduct. But that expression is not left undefined. Far from being all-inclusive, it in fact covers rather narrow ground. The "justification" referred to in Section 2 (b) must be that described in the meeting-competition proviso to that section,¹ or such justification as may be spelled out from the provisions of the particular section—other than Section 2 (b)—creating the offense alleged. This premise is firmly grounded in the decisions.² No one claims that the proviso in Section 2 (b) is applicable to the facts of the present case. Hence we look to Section 2 (c), the section governing here, which contemplates as justification for a *prima facie* violation of that section a showing

to pay, purchase from the purveyor precisely what they want, the foods and beverages they desire to resell. We find ourselves unable to perceive that the "discrimination" has the slightest meaningful resemblance to the purposes of the Act or to any evils it was designed to prevent.

¹ "Provided, however, That nothing herein contained shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

² See *Elizabeth Arden, Inc. v. Federal Trade Commission*, 156 F. 2d 132, 135 (2d Cir. 1946), *cert. denied*, 331 U. S. 806 (1947); *Oliver Bros., Inc. v. Federal Trade Commission*, 102 F. 2d 763, 767 (4th Cir. 1939); *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*, 106 F. 2d 667, 675-77 (3d Cir. 1939), *cert. denied*, 308 U. S. 625 (1940).

by the seller that all purchasers were accorded facilities on "proportionally equal" terms. To repeat: Congress provided only two defenses to charges against one engaged in commerce of conduct which prima facie violates Section 2 (e): (1) under the proviso to Section 2 (b) that the facilities were furnished in good faith to meet the facilities furnished by a competitor; or (2) within the language of Section 2 (e) that in fact the facilities furnished were accorded to all purchasers on proportionally equal terms.

The Simplicity Company makes no contention that it has furnished cabinets and catalogs on proportionally equal terms to the Red Fronts and the fabric stores. Presumably if it afforded facilities on proportionally equal terms the Commission would not object. But Simplicity cannot refuse proportional equality and then argue that its refusal is justified by cost differentials—a defense available in a case brought under Section 2 (a), but not in one brought under Section 2 (e).

As a practical matter, "cost justification" in the present context can only mean that Simplicity may "justify" its actions by showing that many of its fabric store customers do not pay their bills, or are unprofitable to deal with because of small volume, or some similar reason. Such factors may explain Simplicity's desire to discriminate against them in favor of bigger and more profitable accounts, but I see no evidence that Congress has decreed that factors of that sort shall be viewed as legal justification. Quite the contrary, as I see it. In fact, Section 2 (e) of the Act becomes almost meaningless if such defenses are to be allowed to prevail.

I would therefore affirm the Commission's cease and desist order.

APPENDIX B

In the United States Court of Appeals for the
District of Columbia Circuit

No. 13,884—April Term, 1958

SIMPLICITY PATTERN Co., INC., A CORPORATION,
PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

ON PETITION FOR REVIEW OF ORDER OF THE FEDERAL TRADE
COMMISSION

Before WASHINGTON, DANAHER, AND BURGER, *Circuit
Judges*

JUDGMENT

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the order of the Federal Trade Commission on review in this case be, and it is hereby, set aside, and that this case be, and it is hereby, remanded to the Federal Trade Commission for further proceedings consistent with the opinion of this Court.

Dated: May 28, 1958.

Per Circuit Judge DANAHER.

Dissenting opinion by Circuit Judge WASHINGTON.